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No. 620

In the Supreme Court of the United States

October Term

JAMES SICILIANO, Petitioner,

vs.

THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH

TO THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, James Siciliano, respectfully prays that a Writ of Certiorari be issue out of and under the seal of this Court to review the judgment of the Supreme Court of the State of Utah entered August 24, 1961. (Timely petition for rehearing having been denied on the 5th day of October, 1961, R. 0122).

I.

OPINION BELOW

The opinion of the Supreme Court of the State of Utah (R. 0117-0119) with the dissenting opinion is printed in Appendix A hereto and is reported at 364 P. (2d) 413, ... Ut. (2d) .....

II.

GROUNDS ON WHICH JURISDICTION IS INVOKED.

The judgment of the Supreme Court of the State of Utah was entered August 24, 1961 (R. 0119). Rehearing was denied on October 5 1961, (R. 0122). Jurisdiction of this Court is invoked under 28 U.S.C.A. Section 1257 (3).

III.

QUESTIONS PRESENTED

1. Whether in an action under the Federal Employers' Liability Act (45 U.S.C.A. Sec. 51, et seq.) where there was evidence from which a jury found that the railroad company defendant was negligent in requiring plaintiff to use an unsafe piece of equipment, it was error for the Utah State Supreme Court to reverse the judgment entered for the plaintiff on the ground that the defendant was not an insurer.

2. Whether the Utah State Supreme Court committed error in substituting its judgment, on the question of the evidence of employer negligence, for the verdict of the jury and the judgment of the trial court.

3. Whether in substituting its interpretation of the facts for the interpretation necessarily adopted by the jury in an Employers' Liability Act case, the Utah Supreme Court deprived plaintiff of rights guaranteed to him by the statutes and Constitution of the United States.

4. Whether the Utah Supreme Court denied a federally protected right to petitioner in holding that the giving of the italicized portion of the following instruction constituted prejudicial error:

> "You are instructed that at the time of the incident we are concerned with, both plaintiff and defendant were engaged in interstate commerce, and plaintiff's claim for recovery is therefore governed by the Federal Employers' Liability Act. This act provides in substance that every common carrier railroad shall be liable in damages to any employee who suffers injury while employed by such carrier, resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its appliances, machinery or equipment, except where the injury results solely from the negligence of the one so injured.
>
> *"Any such employee shall not be held to have assumed the risks of his employment occasioned by such negligence.*
>
> "In actions against such carrier, the fact that the injured employee may have been guilty of contributory negligence shall not bar recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence, if any, attributable to such employee.
>
> "Under this statute, the test of liability is simply whether the proofs justify with reasons the conclusion that the negligence of the defendant employer played

any part, even the slightest, in producing the injury for which damages are sought.

"If the injury is caused solely by the negligence of the employee, or if the defendant is not negligent, then, of course, no recovery may be had by said employee."

IV.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

1. The Constitutional provision involved in this case is the seventh amendment to the Constitution of the United States, which provides:

> "In suits at common law, where the amount in controversy shall exceed $20.00, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined by any court of the United States than according to the rules of the common law."

2. Statutory provisions involved in this case are certain provisions of the Federal Employers' Liability Act, 45 U.S.C.A., Section 51, et seq., and more particularly, the following:

(a) 45 U.S.C.A., Sec. 51, which provides:

> "Every common carrier by railroad while engaging in commerce between any of the several states . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury . . . resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its . . . appliances, machinery, track . . . or other equipment."

(b) 45 U.S.C.A., Sec. 54, which provides:

"In any action brought against any common carrier under or by virtue of any of the provisions of this chapter, to recover damages for injuries to or the death of any of its employees, such employee shall not be held to have assumed the risk of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents or employees of such carrier; and no employee shall be held to have assumed the risk of his employment in any case where the violation of such common carrier or any statute enacted for the safety of employees contributed to the death or injury of such employee."

V.

STATEMENT

1. *Material Facts.* Petitioner James Siciliano was employed by the defendant railroad company as a machinst. On the day of the injury he was told by another employee to whom petitioner had been assigned for the day to get a coil of wire hanging on a nail. The wire was required to tie back a brake beam. Plaintiff had not used or seen this particular coil of wire before. There was no way for him to know that it was coiled or hanging in a manner to be dangerous. The petitioner raised his right hand in a position approximately the height of his head to lift the wire from the nail. At the instant his hand released the weight of the coil from the nail, an end of the wire sprang loose and flipped into plaintiff's eye. Petitioner's theory was that the coil was hung on the post in a position so that the ends were locked either under the coil or among some of its strands in a spring-like position. In that

position, the precariously balanced coil constituted a trap. The coil was innocent enough in appearance, but in fact, it was extremely dangerous. Defendant's evidence was that the industry practice sanctioned hanging coils of wire with loose ends on a post.

2. How questions were presented in courts below.

(a) *Trial court.* Plaintiff asserted that the defendant was negligent in failing to furnish safe equipment and tools to the petitioner, and particularly that the coil of wire in question constituted a dangerous trap by reason of the manner in which it was hanging on the post. Petitioner asserted that his position to the effect the end of the coil of wire was locked among or beneath the strands, thus rendering it unsafe, was supported by at least three pieces of evidence: (1) the undisputed testimony that when the weight of the coil released the end, it "sprung like lightning" striking petitioner in the eye (R. 0068); (2) the undisputed testimony that when the coil hit the ground, it "sprung more" (R. 0069); (3) the physical characteristics of wire similar to the piece in evidence as Exhibit D-2. The defendant made motions for a directed verdict and for a judgment notwithstanding the verdict of the jury on the grounds that there was no showing of negligence. Defendant's witnesses testified that rolls of wire with loose ends were hung on posts; *the witnesses did not testify that it was customary to hang the coils with ends locked under or among the coils so that they would spring free when the weight of the coil released them.* The trial court denied defendant's motions and instructed the jury that the hanging of a coil of wire with loose ends upon a post could not in and of itself constitute negli-

gence, but "whether or not the manner in which this wire was hung on the post is negligence is for you to determine based upon all of the evidence and such reasonable inferences as may be drawn" (Instruction 20, R. 0057).

The trial court instructed the jury, additionally, without any request from either the plaintiff or the defendant, that under the Employers' Liability Act an employee does not assume the risk of his employment if the defendant is negligent by reason of any defect or insufficiency due to its negligence in its appliances, machinery or equipment (R. 0057).

(b) *Utah State Supreme Court.* On appeal by the railroad company, a majority of the State Supreme Court reversed the judgment of the trial court holding: (i) The evidence did not justify the jury's conclusion that the coil of wire was an unsafe piece of equipment, and (ii) notwithstandig the fact that the ruling on point (i) supra would have disposed of the case, the court gratuitously opined "as a guide for instructions on assumption of risk in FELA cases" that the trial court committed prejudical error in instructing the jury that under the Act, an employee does not assume the risk of employer negligence. Justice A. Crockett, dissented on the grounds that (i) there was evidence to support the jury's conclusion, and under *Rogers v. Missouri R.R. Co.* (1957) 352 U.S. 500, 77 Sup. Ct. 443, 1 L. Ed. (2d) 493, the verdict should not be disturbed on appeal, and (ii) while the instruction on assumed risk was unnecessary, it was not prejudical error.

VI.

REASONS FOR GRANTING THE WRIT.

1. The decision of the Utah State Supreme Court is not in accord with applicable decisions of this Court in that, in a Federal Employers' Liability Act case, it failed to limit its review to the question as to whether the evidence, with reason, supports the jury's verdict.

2. The decision of the Utah Supreme Court conflicts with the decision of at least two circuit courts in holding that prejudical error results from giving an instruction to the effect that in FELA cases, the employee does not assume the risk of employer negligence.

3. The opinion of the Utah Supreme Court conflicts with the decisions of this Court and circuit courts of the United States upon questions involving federal law.

(a) The State Court opinion failed to conform to *Rogers v. Missouri R.R.* with respect to the factors involved in reviewing the trial court's judgment in FELA cases.

(b) The State Court decision held as prejudicial error an instruction approved by two circuit courts of appeal to the effect that an employee does not assume risk of employer negligence in cases under FELA.

4. The decision of the Utah Supreme Court denied petitioner the right of jury trial protected under the 7th Amendment to the Constitution of the United States.

ARGUMENT

POINT I.

THE DECISION OF THE UTAH STATE SUPREME COURT IS NOT IN ACCORD WITH APPLICABLE DECISIONS OF THIS COURT IN THAT, IN A FEDERAL EMPLOYERS' LIABILITY ACT CASE, IT FAILED TO LIMIT ITS REVIEW TO THE QUESTION AS TO WHETHER THE EVIDENCE WITH REASON SUPPORTS THE JURY'S VERDICT.

The facts in this case were susceptible to two interpretations:

1. The coil of wire was hung in a position of tension or spring with its ends held under among the strands. That such a piece of equipment is unsafe for ordinary use—that it constitutes a trap — requires no elaboration. This was the plaintiff's theory.

2. The coil of wire was hung with loose ends without tension in the manner wire is ordinarily hung in industrial plants. This was the defendant's theory.

The defendant did *not* offer evidence, as the majority opinion below seems to imply, (cf R. 0117) that the prevailing practice was to hang coils of wire in a position of spring or tension with the ends locked under or among the coils.

The jury was instructed that the hanging of a coil of wire with loose ends upon a post could not in and of itself constitute negligence (Court Instruction No. 20. R. 0057), but "whether or not the manner in which this wire was hung on

the post is negligence for you to determine based upon all of the evidence and such reasonable inferences as may be drawn" (ibid). Thus the jury was instructed that there could be no negligence on the defendant's theory. The jury necessarily adopted the plaintiff's theory and necessarily determined that the coil of wire in the particular circumstance of this lawsuit constituted a trap and was not a safe piece of equipment

This Court has repeatedly, uniformly and pointedly held that the only question which the appellate court should review in considering whether the judgment is supported by evidence is whether the jury could find that employer negligence played any part at all in producing the injury, or stated another way, whether there is any evidence which with reason could be said to support the jury's findings. " . . . Judges are to fix their sights primarily to make that appraisal and if that test is made are bound to find that a case is made out, whether or not the evidence allows the jury a choice of other possibilities." *Rogers v. Missouri R.R. Co.* (1957) 352 U.S. 500, 1 L. Ed. (2d) 493, 77 S. Ct. 443; rehearing denied 353 U.S. 941, 1 L.Ed(2d) 764, 77 S. Ct. 808.

One cannot read the cases following the Rogers case and have any doubt that its teaching represents the firm and considered judgment of the majority of the Court in cases of this kind.

Webb v. Illinois Cent. R. Co. (1957) 352 U.S. 512, 1 L.Ed (2d) 503, 77 S. Ct. 451; *Shaw v. Atlantic Coast Line R. Co.* (1957) 353 U.S. 920, 1 L.Ed (2d) 718, 77 S. Ct. 680; *Futrelle v. Atlantic Coast Line R. Co.* (1957) 353 U.S. 920, 1 L.Ed (2d) 718, 77 S.Ct. 682; *Dean v. Gulf, C. & S. F. R. Co.* (1957)

353 U.S. 925, 1 L.Ed (2d) 721, 77 S. Ct. 715; *Thompson v. Texas & Pac. R. Co.* (1957) 353 U.S. 926, 1 L.Ed (2d) 722, 77 S. Ct. 698; *Arnold v. Panhandle & S. F. R. Co.* (1957) 353 U. S. 360, 1 L.Ed. (2d) 889 77 Sup. Ct. 840, reh. d. (1957) 354 U.S. 927, 1 L.Ed. (2d) 1441, 77 Sup. Ct. 1375; *McBride v. Toledo Terminal R. Co.* (1957) 354 U.S. 517, 1 L.Ed (2d) 1534, 77 S. Ct. 1398; *Gibson v. Thompson* (1957) 355 U.S. 18, 2 L.Ed (2d) 1, 78 S. Ct. 2; *Honeycutt v. Wabash R. Co.* (1958) 355 U.S. 424, 2 L.Ed (2d) 380, 78 S. Ct. 393; *Ferguson v. St. Louis-San Francisco R. Co.* (1958) 356 U.S. 41, 2 L.Ed (2d) 571, 78 S. Ct. 671; *Butler v. Whitman* (1958) 356 U.S. 271, 2 L.Ed (2d) 754, 78 S. Ct. 734; *Moore v. Terminal R.R. Assn.* (1958) 358 U.S. 31, 3 L.Ed (2d) 24, 79 S. Ct. 2; *Harris v. Penn R.R. Co.* (1959) 361 U.S. 15, 4 L.Ed (2d) 1, 80 S. Ct. 22; *Conner v. Butler* (1959) 361 U.S. 29, 4 L.Ed (2d) 10, 80 S. Ct. 21; *Sentilles v. Inter-Caribbean Shipping Corp.* (1959) 361 U.S. 107, 4 L.Ed (2d) 142, 80 S. Ct. 175; *Davis v. Virginian Railway Co.* (1960) 361 U.S. 354, 4 L.Ed (2d) 366, 80 S. Ct. 387. Failure of the writer of the majority opinion for the Utah Supreme Court to refer to a single case since *Rogers* is significant, particularly in view of the authoritative suggestion that " . . . earlier cases . . . should be examined in the light of the Rogers and Webb cases." Anno. 4 L.Ed (2d) 1787 at Note 8, page 1793. It is submitted that *Conner v. Butler*, supra, for instance, cannot be distinguished in principle.

Rather than considering the simple question upon which appellate judges are counseled to fix their sights, the majority of the court below in the case at bar was apparently misled by a consideration of "insurer" liability. The plaintiff in this

case has never claimed that the defendant was an insurer. The jury was expressly instructed upon the defendant's own request (Def. Request No. 1, R. 0021) that the defendant was not an insurer of plaintiffs' safety (Instruction No. 10, R. 0046). It is equally clear, however, that as a matter of law, the plaintiff is not an "insurer" of his own safety. In this connection the defendant itself effectively proved on cross examination of plaintiff that he did not anticipate and could not have foreseen the dangerous condition of the coil of wire as it hung upon the nail. In response to determined cross examination, petitioner admitted "I didn't know it was going to flip on me" (R. 0082). Yet the effect of the decision of the majority of the Utah Supreme Court effectively requires the petitioner to assume the total burden of his loss.

This court has explicitly adopted and repeated the view that the philosophy of the Federal Employers' Liability Act is this: Industrial accidents do not generally "just happen"; they are brought about. Mr. Justice Brennan, speaking for the majority of this Court in *Sinkler v. Missouri R.R. Co.* (1958) 356 U.S. 326, 2 L.Ed(2d) 799, 78 S. Ct. 758, stated (at 329 U.S. Report, 802, 803 L.Ed):

> " . . . The cost of human injury, an inescapable expense of railroading, must be borne by someone, and the FELA seeks to adjust that expense equitably between the worker and the carrier . . . "

The rule which imposes liability for damages when employer negligence played *any part at all* in the injury necessarily requires that appellate review be limited to the question as to whether the jury could fairly find upon any reasonable basis that an unsafe condition was "brought about" by the railroad.

In the case at bar, the railroad admittedly hung the coil of wire on the post and then required petitioner to use it.

It is submitted that the appropriate scope of review by the Utah State Supreme Court was a consideration of two simple questions:

1. Can it be determined as a matter of law that the coil of wire was not in a posture of tension, similar to a trap, in accordance with the theory necessarily adopted by the jury?

2. Can it be held as a matter of law that a coil of wire hanging on a nail in a position of spring or tension as a trap is a safe piece of equipment?

An affirmative answer to either of these questions could not withstand objective analysis. It is suggested that the railroad company cannot answer this petition without making the same argument to the Court which the jury rejected and that is exactly what it is disabled from doing under prior decisions of this court. Compliance with the admonitions of this Court in *Rogers* and succeeding cases necessarily would have led to affirmation of the judgment of the trial court.

POINT II.

THE STATE COURT FAILED TO APPLY APPLICABLE FEDERAL LAW IN RULING THAT THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT UNDER FELA AN EMPLOYEE DOES NOT ASSUME THE RISK OF EMPLOYER NEGLIGENCE.

In ruling that the jury's verdict was not supported by the evidence, reversing plaintiff's judgment and ordering the trial

court to enter judgment for the defendant, the State Supreme Court made a final disposition of the case insofar as its own powers are concerned. However, as an apparent gratuity to the railroad, and "in order to serve as a guide for instructions on assumption of risk in FELA cases," the Court held that it was prejudicial error to instruct that the petitioner did not assume the risk of any negligence by the defendant (R. 0117, page 2). It is submitted that failure to follow *Rogers v. Missouri R.R.* case requires reversal. The question remains as to whether petitioner is entitled to have the judgment of the trial court reinstated because the State Supreme Court erred in its ruling on the assumption of risk instruction, or whether the ruling correctly states the law so that petitioner is entitled only to a new trial.

This court has reviewed FELA cases involving only the propriety of instructions, *O'Donnel v. Elgin, Joliet and E.R. Co.* (1949), 338 U.S. 384, 94 L.Ed. 187, 70 S. Ct. 200; *Ward v. Atlantic Coast Line Co.* (1960) 362 U.S. 396, 4 L.Ed(2d) 820, 80 S. Ct. 789. The erroneous ruling on the instruction provides an additional reason for granting the writ in the instant case.

The Utah Supreme Court decision here holds as error the giving of the kind of an instruction approved by two circuit courts of appeal. In *Texas and Pacific R.R. v. Buckles* (CCA 5, 1956) 232 F.(2d) 275, cert. d. (1956) 351 U.S. 984, 100 L. Ed. 1498, 76 Sup Ct. 1052, the following instruction was held by the Fifth Circuit to be "clearly correct" (at page 263, Note 13):

> "We now instruct you on the question of assumption of risk. In any suit brought against a railroad under

> this law to recover damages for injury to an employee, such employee does not assume any of the risks of his employment in any case where the injury resulted, in whole or in part, from the negligence of any of the agents or employees of the railroad."

This case was relied upon the majority of the Utah Court in the case at bar, (R. 0117, page 2) although it is submitted that it is directly opposed to the majority's opinion. In *Atlantic Coast Line v. Burkett*, (CCA 5, 1951) 192 F.(2d) 941, the Fifth Circuit held, in direct opposition to the Utah Court's holding in the case at bar, that such an instruction was appropriate although the issue was not specifically raised, where the instructions on negligence were clear.

The Seventh Circuit has ruled twice that the giving of an instruction similar to that given in the case at bar at the request of an employee was not erroneous. *Larsen v. Chicago and N.W. R. Co.* (1948) CCA 7, 171 F (2d) 841, 846; *Wantland v. Illinois Central R.R. Co.* (1956) CCA 7, 237 F (2d) 921, 926. In the latter case the Court stated:

> "The Railroad also insists that the trial court erred in instructing the jury that the Federal Employers Liability Act provides that an employee shall not be held to have assumed the risks of his employment. This court had occasion to pass on a similar contention in Larsen v. Chicago & N.W.R. Co., 7 Cir. 171 F. 2d 841, 846, where it was held that such an instruction was not erroneous."

The majority of the State Court relies on certain language of Mr. Justice Frankfurter in *Tiller v. Atlantic Coast Line R.R. Co.* (1943) 318 U.S. 54, 63 S. Ct. 444, 455, 87 L.Ed. 610, as "the coup that seems to have led to the disapproval of

the instruction in FELA cases . . . " (R. 0117, page 2).

It is submitted that the confidence of the majority of the Utah Court in the language following Note 9 of their opinion is misplaced. All that Mr. Justice Frankfurter said, in its context, was that under the 1939 amendment, an employee does not assume the risk of employer negligence. The sentence in his opinion immediately following the place where the Utah Court ended its quotation is the important one: "But until Congress chooses to abandon the concept of negligence, upon which the Act now rests in favor of a system of workmen's compensation not dependent upon negligence, the courts cannot discard the principle expressed in one of its senses, by the phrase 'assumption of risk', namely, that a carrier is not liable unless it is negligent." If, in some other sense, the term "assumption of risk" may be a "hazardous legal tool," it certainly cannot be said to have created any confusion in the sense and context in which it was used by the trial court here. In the case at bar there were careful, painstaking instructions upon negligence, contributory negigence, proximate cause, accidents without fault (Instructions 4, 8, 13, 16 R. 0039-0044, 0049, 0052). The Court explicitly instructed the jury, in accordance with the defendant's theory of the facts, that the hanging of a coil of wire with loose ends could not, in and of itself, constitute negligence (R. 0057).

It has become an established practice in the State of Utah to instruct the jury in FELA cases that the defendant is not an insurer. See *Moore v. D & RGW R. Co.* (1956) 4 Ut. (2d) 255, 292 P. (2d) 849, 852. Such an instruction was given at the defendant's request here (Def. Requested Instruc-

tion 1; R. 0021, Court's Instruction 10, R. 0046). Mr. Justice Crockett observed in the *Moore* case:

> "Courts habitually give cautionary instructions as was done in this case. Instruction No. 20 told the jury that the defendant was not an insurer of the safety of its employees. No such issue had been raised and it may be argued that the instruction was unnecessary. However, it is invariably requested by the defendant in such cases, and is usually given. It falls in the same category as the two instructions discussed in the main opinion. It does no harm as a precaution and does not misstate the law. The same reasoning applies to Instruction No. 13 relating to assumption of risk, the giving of which has been held not to be error. This court expressly so stated in Bruner v. McCarthy in speaking of such an instruction: 'Yet this could not be prejudicial to the defendants. * * * .' In any event, I doubt that even the most hyper-technical would say that the instructions were reversible error."

In his dissenting opinion in the case at bar, Mr. Justice Crockett referred to his comments in the prior case (R. 0018, page 2). Rule 61 of the Utah Rules of Civil Procedure is substantially identical with Rule 61 of the Federal Civil Rules. It requires that reversal be predicated only upon a showing of prejudice. The holding of the majority of the Utah Court on this point violates the rule which the Court itself established in the prior case of *Bruner v. McCarthy* (1943) 105 Ut. 299, 142 P.(2d) 649, where it expressly held that the giving of such an instruction could not be prejudicial to the defendant.

A resume of the history of the assumption of risk doctrine is given by Mr. Justice Black in his opinion in *Tiller v. Atlantic Coast Line Co.* (1943) 318 U.S. 54, S. Ct. 444, 87 L.Ed. 610.

The reason for the adoption of the 1939 amendment to the FEL Act was there explained as the "insurmountable difficulty in distinguishing between contributory negligence and assumption of risk" as a result of the "niceties if not the casuistries of distinguishing between (them)." In the case at bar, the main defense was that the plaintiff's own negligence caused the injury. (See defendant's requested instruction 5 (R. 0025), 14 (0034); Defendant's Answer (R. 0005); Pretrial Order (R. 0007).

In the *Atlantic Coast Line* case, supra, the Fifth Circuit said at 943):

> "Under the pleadings and evidence in this case, we think that the trial judge was justified in thinking that in the absence of a charge on assumption of risk, the jury might have considered that defense under the guise of nonnegligence. As said in the Tiller case, supra (318 U.S. 54, 63 S. Ct. 447):
>
> " 'Unless great care be taken, the servant's rights will be sacrificed by simply charging him with assumption of risk under another name.'
>
> "Further, we should disregard any error which does not affect the substantial rights of the parties, and should not reverse and remand this cause for a new trial on account of any alleged error unless it appears to us that our refusal to take such action is inconsistent with substantial justice. Federal Rule of Civil Procedure, rule 61, 27 U.S.C.A."

It is submitted that the giving of the instruction to the effect that the risk of employer negligence was not assumed by the petitioner could not even be fairly stated to be error. In no event should it be classified as prejudicial error. The

ruling of the Utah Court does not conform to the applicable federal rule.

POINT III.

THE ERRORS OF THE UTAH STATE SUPREME COURT DEPRIVED THE PLAINTIFF AND PETITIONER OF RIGHTS GIVEN TO HIM BY THE STATUTES AND CONSTITUTION OF THE UNITED STATES

That the State Supreme Court committed error in reversing the judgment of the trial court is demonstrated in Points I and II of the argument. The rule that prejudicial error in FELA cases constitutes a denial of a federal right is well established in this Court. *Urie v. Thompson* (1949) 337 U.S. 163, 174, 93 L.Ed 1282, 1295, 69 S. Ct. 1018, 11 ALR (2d) 252. *Rogers v. Missouri R.R. Co.* (1957) 352 U.S. 500, 1 L.Ed (2d) 493, 77 S. Ct. 443. See generally the cases decided by this Court and cited in Points I and II of this argument.

The rule has been applied in a variety of contexts. "The rights which the Act creates are federal rights protected by federal rather than local rules of law (citing cases)." *Baile v. Central Vermont R. Co.* (1942) 319 U.S. 350, 352, 87 L. Ed. 1444, 1447; *Rice v. Akron C. & Y. R. Co.* (1951) 342 U.S. 359, 96 L. Ed 398, 22 S. Ct. 312; *Harris v. Penn. R. Co.* (1959) 361 U.S. 15, 4 L. Ed. (2d) 1, 80 S. Ct. 22.

CONCLUSION

The ruling of the Utah State Supreme Court in the instant case demonstrates a calculated hostility to the Act, as its

humanitarian purposes have been reiterated in this Court. It denies the petitioner substantive federal rights. If the decision is permitted to stand it will substantially impair the uniform and fair administration of justice in FELA cases.

For the reasons referred to herein, this petition for a Writ of Certiorari should be granted. Upon review by this Court, the judgment of the Utah State Supreme Court should be reversed and the judgment of the District Court in and for Salt Lake County, Utah, should be reinstated.

Respectfully submitted,

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APPENDIX A

IN THE SUPREME COURT OF THE STATE OF UTAH

James Siciliano,
Plaintiff and Respondent,

v.

The Denver and Rio Grande Western Railroad Company, a corporation,
Defendant and Appellant.

No. 9378

HENRIOD, Justice:

Appeal from a verdict in favor of plaintiff for an on the job eye injury in a Federal Employers Liability Act[1] case. Reversed. Costs to defendant.

The injury occurred in September, 1952, at a time when plaintiff was about 53 years of age and had been working as a machinist for defendant for 30 years. Trial of the case came 8 years later in 1960.

On the day of the injury plaintiff was working on a steam engine, with another employee, Wells, not his boss. Wells asked plaintiff to get a piece of wire hanging on a peg nearby. Plaintiff, only witness to what ensued, testified that he "reached up for the wire and all at once it sprung and came like lightning and I dropped the wire" and "when I dropped the wire it sprung that much more." He said the end of the wire struck him in the eye. That is the sum total of the evidence upon which plaintiff bases his claim that defendant was negligent.

1 45 U.S.C.A.

Defendant presented evidence that coils of wire with loose ends customarily were hung on pegs by industrial plants.

Besides claiming that plaintiff failed to sustain his burden of proving defendant negligent in at least some degree,—as he must,—defendant urges that the court erred in giving an objected to instruction that plaintiff did not assume any risk in his employment.

Under the facts of this case we feel constrained to and do hold that as a matter of law there was no proof offered by plaintiff, by controverted evidence or otherwise, from which reasonable persons could find that defendant was guilty of negligence in any degree.

It has been established that the employer must respond in damages under the Act if it was negligent in any degree.[2] However, as stated by Mr. Justice Douglas in Ellis v. Union Pacific RR.,[3] "The Act does not make the employer the insurer of the safety of his employees while they are on duty. The basis of his liability is his negligence, not the fact that injuries occur."[4] We can see nothing in the record here that establishes such negligence, and we are convinced that to allow recovery here would be to transcend the interdiction of the Ellis case that "the Act does not make the employer the insurer of the safety of his employees."

As to the contention that it was prejudical error to instruct the jury as to assumption of risk, we agree. No issue was raised by defendant's pleading on that score, and there was no evidence that remotely could have suggested that assuming the risk would have prevented recovery here. Nor would have been proper an instruction on assumption of risk had this been a case divorced from the F.E.L.A. (which specifically eliminates

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2. 45 U.S.C.A. Sec 51, cases shown in note 871.
3. 329 U.S. 694, 67 S. Ct. 598, 91 L.Ed. 572 (1947).
4. We quoted the language with approval in Lasagna v McCarty, 111 Utah 269, 177 P.2d 734, and the language also was approved in 1955 in the federal courts in Atlantic Coast Line RR v. Anderson, 221 F.2d 548, see also in Marcades v New Orleans Terminal Co., 111 Fed Supp 650, Inman v B & O RR., 108 Ohio App. Rep. 124, 161 N.E. 2d 60

such defense), since the evidence showed conclusively that Siciliano had no knowledge of any hazard, such knowledge being a necessary factor before assumption of risk can be urged as a defense.[5]

Mr. Chief Justice Wolfe expressed our disapproval of such an instruction where the issue was not raised, in Bruner v. McCarthy,[6] but said under the circumstances, where negligence had been established as a matter of law, it could hardly prejudice anyone. In another F.E.L.A case, Moore v. D.&R.G.W. RR.,[7] Mr. Justice McDonough lent emphasis to such disapproval by saying that "In the present case, as in the Bruner case, no issue of assumption of risk was raised by the pleadings or the evidence and no good purpose could have been served by the giving of such an instruction. In some cases, it is conceivable that (the instruction) might be proper and necessary to dispel improper inferences from pleadings and evidence . . . It is unnecessary for us to determine whether under the facts of this case the giving of the instructions constituted reversible error since the case is reversed on other grounds. The instructions were improper and should not be given in the new trial granted under this opinion." The Nebraska case of Ellis v. Union Pac. RR.[8] emphasizes such disapproval in even stronger language.

The coup that seems to have led to the disapproval of the instruction in F.E.L.A. cases, was executed by Mr. Justice Frankfurter in his concurrence in Tiller v. Atlantic Coast Line RR.,[9] when he said:

> " 'Assumption of risk' as a defense where there is negligence has been written out of the act. But 'assumption of risk', in the sense that the employer is not liable for those risks which it could not avoid in the observance of its duty of care, has not been written

5 Clay v. Dunford, 121 Utah 177, 239 P.2d 1078
6 105 Utah 399, 142 P.2d 649
7 4 Utah 2d 255, 292 P.2d 849
8 148 Neb. 515, 27 N.W. 2d 921
9 318 U.S. 54, 63 S. Ct. 444, 87 L. Ed. 610

> out of the law. Because of its ambiguity the phrase 'assumption of risk' is a hazardous legal tool. As a means of intsructing a jury, it is bound to create confusion. It should therefore be discarded."

This language was referred to and applied in Texas & Pac. Ry. v. Buckles.[10]

In order to serve as a guide for instructions on assumption of risk in F.E.L.A. cases, we state that in the usual case it is prejudicial error to instruct that under the act the employee does not assume the risks of his employment occasioned by the employer's negligence, unless, as Mr. Justice McDonough pointed out in the Moore case, such issue was raised by the pleadings and evidence,—and we might add unless raised by the pleadings *or* evidence. There may be a case where the issue was not pleaded but where the evidence so emphasizes the fact that the employee recklessly and foolishly took on a known and dangerous hazard as to "create improper inferences" that should be "dispelled" by a cautionary instruction, as reflected in the language of Mr. Justice McDonough.

WE CONCUR:

Lester A. Wade, Chief Justice

Roger I. McDonough, Justice

F. R. Callister, Jr., Justice

CROCKETT, Justice: (Dissenting)

Believing that the trial court correctly determined that a jury question existed as to the defendant's negligence, I am constrained to disagree with the conclusion of the majority opinion.

I am quite in accord with the thought often expressed that the railroad is not an insurer of the safety of its employees, and that it is not required to eliminate all danger in the work. The very nature of railroading makes any such requirement

10 232 Fed. 2d 257.

impractical. Yet it is fundamental that the railroad does have the duty to exercise reasonable care to provide not only a safe place, but also safe means for its employees to work, and to eliminate all dangers which reasonable prudence and caution would foresee and guard against. If the circumstances are such that reasonable men might differ as to whether dangers exist with respect to which reasonable care would have required additional precautions, that very difference of opinion makes the question of negligence one for the jury.

The opinion quotes from the plaintiff's testimony that he "reached up for the wire and all at once it sprung and came light lightning and I dropped the wire . . . when I dropped the wire it sprung that much more." The plaintiff's claim was that the piece of wire, 12 to 15 feet long, rolled into a coil 8 to 10 inches in diameter, with the ends turned into the coil so that they were held under tension and thus likely to flip out when the tension was released, constituted a hazard to his safety; and that when the tension was released, the loose ends did flip out resulting in the injury to his eye. It is not questioned that it was a continuing practice for the employees to thus keep and use wire in connection with their work. Undoubtedly further precautions could have been taken to remove or reduce any hazard of the type claimed by the plaintiff. For a statement as to submission of the question of negligence to a jury when further precautions may have been taken, see Boston & M. RR. v. Meech, 156 F. 2d 109 (1946).

I have heretofore stated my views in regard to the desirability of giving more than lip service to the right of trial by jury and the virtue of exercising judicial restraint from the temptation to interfere therewith because we may not agree with the verdict. Stickle v. D. P. RR. Co., 122 Utah 179, 258 P. 2d 867, 871. I suppose that all judges, certainly including the writer, occasionally bewail what appear to be the vagaries and inconsistencies of juries. But so long as the verdict rendered finds support in the evidence and is not beyond the pale of

reason, for a court to nullify the verdict is to encroach upon the jury's prerogatives and to that extent to impair the system. To operate as it is supposed to do, trial by jury must entail something more than giving the jury the privilege of guessing what the court thinks, and if they guess right the verdict is valid and if they guess wrong it is set aside.

Cases decided by the United States Supreme Court have consistently gone to great lengths in holding that an employee injured in his employment is entitled to have a jury pass on his case whenever there is any basis whatever in the evidence on the part of the railroad which caused or contributed toward his injury. See Wilkerson v. McCarthy, 336 U.S. 53 (1949). As stated in Rogers v. Missouri Pacific RR. Co., 352 U.S. 500 (1957) it does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to some other cause, including the employee's contributory negligence.

It is not to be questioned that on appeal it is the responsibility of this court to make an objective analysis of the question under discussion. But in case of doubt or uncertainty, it seems to me entirely proper to give some consideration to these facts. The trial judge had the issue before him and decided the question to be one for the jury and submitted it to them. The jury, presumably comprised of reasonable persons, found from the evidence that the railroad was negligent. Thereafter upon a motion for a new trial the judge was again confronted with the question and denied the motion. As stated in Geary v. Cain, 69 Utah 340, 255 P. 423 (1927):

> "... in case of doubt, the deliberate action of the trial court should prevail. Otherwise this court will sooner or later find itself usurping the functions of both the jury and the trial court, in violation of the spirit, if not the letter of the Constitution."

Based upon the foregoing considerations it appears to me that the evidence and the reasonable inferences that could be

drawn therefrom are such that fair minded men might differ as to whether the railroad was guilty of negligence which contributed to cause the plaintiff's injury.

Although I agree that it was not necessary to so instruct, I do not think it was prejudicial error to instruct that the plaintiff did not assume the risks in his employment. See my concurring opinion in Moore v. D & R G W RR., footnote seven of the main opinion. It is therefore my conclusion that the verdict should be affirmed.